

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

\* \* \* \* \* C.A. NO. 21-278-JJM  
PAUL BOWARY, M.D.  
VS.  
AUGUST 30, 2021  
2:00 P.M.  
UNITED STATES MEDICAL  
LICENSING EXAMINATION, et al  
\* \* \* \* \* VIA VIDEOCONFERENCE

BEFORE THE HONORABLE JOHN J. McCONNELL, JR.,  
CHIEF JUDGE

(Motion for Preliminary Injunction)

SEALED

APPEARANCES:

FOR THE PLAINTIFF: DENNIS T. GRIECO, II, ESQ.  
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FOR THE DEFENDANT: ROBERT M. DUFFY, ESQ.  
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Court Reporter: Karen M. Wischnowsky, RPR-RMR-CRR  
One Exchange Terrace  
Providence, RI 02903

1 30 AUGUST 2021 -- 2:00 P.M.

2 VIA VIDEOCONFERENCE

3 THE COURT: Good afternoon, everyone. We're  
4 here today in the case of Paul Bowary v. United States  
5 Medical Licensing Examination, National Board of  
6 Medical Examiners, et al, 21-278, and we're here on  
7 Plaintiff's motion for a preliminary injunction.

8 Would counsel identify themselves for the  
9 record.

10 MR. GRIECO: Dennis Grieco, your Honor,  
11 representing the Plaintiff; and with me is Susan  
12 Taylor, who is not -- had not entered an appearance in  
13 this case but is the Plaintiff's immigration attorney  
14 and had asked just to observe the argument this morning  
15 in case it relates to anything she has to do for him  
16 with immigration.

17 THE COURT: Everything we do is public, so  
18 that's no problem at all. Welcome, Ms. Taylor.

19 MS. TAYLOR: Thank you, your Honor.

20 THE COURT: Mr. Duffy?

21 MR. DUFFY: Good morning, your Honor. Robert  
22 Duffy for the Defendants, and with me is Bob Burgoyne  
23 who will be handling the argument.

24 THE COURT: Great. Good morning, gentlemen.  
25 Welcome back, Mr. Burgoyne.

1 MR. BURGOYNE: Thank you.

2 THE COURT: Mr. Grieco.

3 MR. GRIECO: Your Honor, I know the parties have  
4 submitted extensive memoranda to you.

5 THE COURT: Oh, yes, you have.

6 MR. GRIECO: And I think -- obviously, the  
7 extent of both sides' memoranda reflects the  
8 significance of these issues to both sides, and it  
9 can't be understated the significance of your Honor's  
10 decision this morning with respect to Dr. Bowary.

11 And, your Honor, as is always the case before  
12 you, counsel for both sides have spent an inordinate  
13 amount of energy, appropriately so, detailing all the  
14 relevant law and detailing all the relevant facts.

15 Before I address some of that, your Honor, you  
16 know, I'd just like to make the overall point here that  
17 not only is a party's efforts before the Court, and  
18 certainly we argue Dr. Bowary's efforts in the hearing  
19 process before the USMLE, need to be grounded in some  
20 measure of fundamental fairness; and I would just make  
21 the observation here, your Honor, that despite both  
22 sides' extensive and well-formed arguments, this is  
23 clearly a circumstance where if Dr. Bowary is not  
24 permitted to take this test, he is going to be  
25 deported.

1           We have an affidavit from the attorney  
2     representing him in his immigration -- with respect to  
3     his immigration status. It makes that abundantly  
4     clear.

5           And what this comes down to is while we have  
6     lots of claims and lots of arguments about what USMLE  
7     should have done and what damage it's caused to  
8     Dr. Bowary, the reality is this comes down to whether  
9     it makes sense and is fundamentally fair to simply let  
10    Dr. Bowary take this test so he's not deported and  
11    then --

12           THE COURT: Mr. Grieco, what legal basis is  
13    presently before me that would allow -- that would  
14    result in my ordering him to be allowed to retake the  
15    test?

16           The only legal avenue that I could think of,  
17    having read all the papers, that would get me to that  
18    conclusion would be a finding based on the evidence  
19    that the initial e-mail was not a forgery, was not a  
20    fake; and absent being able to come to that, what legal  
21    basis is there that would allow me to order the medical  
22    examining board to allow the doctor to retake the test?

23           MR. GRIECO: So I would respectfully disagree,  
24    your Honor. I don't think at this stage on a motion  
25    for preliminary injunction you actually have to make --

1 and it is an irrefutable finding that that e-mail was  
2 authentic. We provided you with --

3 THE COURT: I have to find that you have a  
4 likelihood of success.

5 MR. GRIECO: Which is exactly --

6 (Overlapping speech)

7 MR. GRIECO: I'm sorry, your Honor. You're  
8 right. And you have to find a likelihood of success,  
9 and that is not a definitive finding. I mean, the case  
10 law is clear and the Defendants haven't argued  
11 otherwise that finding there's a likelihood of success  
12 on the merits, meaning, number one, one of our  
13 arguments is that e-mail was authentic and, therefore,  
14 you could make some finding that we can likely prove  
15 that, that's not a definitive finding.

16 And I would suggest, your Honor, that the  
17 evidence before the Court right now is abundantly in  
18 favor of finding it's likely authentic. You have a  
19 detailed report from a forensic expert who's got  
20 national, if not worldwide, qualifications who says  
21 just that and really nothing to the contrary.

22 But I would take one step back. So I think on  
23 the record before your Honor, I would argue it's  
24 unequivocally clear that it is likely we can prove and  
25 will prove that the e-mail was authentic, and that's

1 all you have to find.

2 But I would take one step back, your Honor. I  
3 don't think you actually even have to make a finding  
4 about the authenticity of that e-mail or the likelihood  
5 that we're going to prove its authenticity to decide  
6 the issues before your Honor right now.

7 I say that for two reasons. Our claims upon  
8 which we are seeking this preliminary injunction really  
9 don't go to the merits of whether that e-mail was  
10 authentic or not. They go to whether or not USMLE and  
11 the Defendants that make up USMLE breached their  
12 contractual obligation to provide a hearing process  
13 that comports with their own express policies.

14 THE COURT: Stop right there, then, because, I  
15 mean, I'll forecast it a little bit. I don't believe  
16 that there is sufficient evidence before me right now  
17 for me to make -- I don't think you've met your burden  
18 of showing me likelihood of success on the authenticity  
19 or nonauthenticity of the e-mail. So I don't think  
20 that's on the table for my consideration.

21 I believe at best the evidence that's before me  
22 on that issue is a wash to be determined by an  
23 appropriate factfinder. That's why I say at best it's  
24 that. And because you have the burden, you will have  
25 the burden, you don't meet that barrier in my mind.

1       That's the conclusion I've come to.

2               Let's now look at the procedural aspect, which  
3       is basically the underlying part of your breach of  
4       contract, et al, claims.

5               If I were to find that the procedures weren't  
6       properly followed, take me from that finding to the  
7       remedy of either, A, ordering him -- ordering them to  
8       give him another shot at the exam or, B, you know,  
9       finding that he found it -- that he passed it.

10              MR. GRIECO: So with respect to ordering --

11              THE COURT: Let me try it this way instead, a  
12       little more clearly. Isn't the only remedy that's  
13       available, if I were to find a procedural problem with  
14       how this was carried out, that the procedure be redone?

15              MR. GRIECO: No. I would abjectly --

16              THE COURT: Tell me why not because, I'll tell  
17       you right now, in thinking about that, that's the only  
18       conclusion I've come to on the issue of remedy.

19              We can go back to the underlying issue later,  
20       but I just want to make that remedy connection because  
21       that's what -- I'm having a hard time with that.

22              MR. GRIECO: And that's a fair question, your  
23       Honor. And before I answer it, I understand and I  
24       respect what you said about your conclusion that the  
25       Plaintiff has not met the burden with respect to the

1 authenticity of the e-mail; and I'd like to, with your  
2 permission, make one quick comment about that.

3 On the record before you, I would respectfully  
4 disagree. You have a report from an expert whose  
5 qualifications have not been disputed in any way, shape  
6 or form in this proceeding and who has, in detailed  
7 fashion, demonstrated unequivocally that the e-mail was  
8 authentic, and you don't have anything to the contrary.

9 I guess I shouldn't say that. The only thing  
10 you have to the contrary is the description of the  
11 analysis that was done by USMLE's staff, which, again,  
12 no one has submitted anything about the qualifications  
13 of that staff member who did it. So I would argue  
14 their opinions are inadmissible. You have no  
15 understanding of what the qualifications are of that  
16 person claiming to have the expertise to make that  
17 determination.

18 So that, in and of itself, gives you an  
19 admissible expert opinion that it's authentic on the  
20 Plaintiff's side and nothing on the Defendant's side.

21 So for those reasons -- I understand your  
22 hesitancy, Judge. You have this one expert opinion, we  
23 haven't had a trial, no one's cross-examined him. I  
24 get all that; but on the state of this record, the  
25 unrefuted evidence is that it is authentic; but I



1 understand and respect your findings.

2 With respect to your question about the remedy,  
3 so, Judge, this is something that neither party has  
4 actually briefed. The Defendants didn't argue that the  
5 only appropriate remedy here would be to remand it, so  
6 I don't have the case law to cite to you.

7 But I know and I suspect your Honor has  
8 familiarity with case law certainly in constitutional  
9 due process contexts where definitive relief is awarded  
10 as a result of a finding there's been a due process  
11 violation as opposed to just remanding it and let the  
12 party that, I would argue in this case, abjectly  
13 refused to comply with their own written policies that  
14 would have provided a fair hearing and given them a  
15 second bite at the apple.

16 How is that a fair remedy in the first place?  
17 It allowed any party --

18 THE COURT: It's the usual remedy for a due  
19 process violation, is you allow the process to work its  
20 way through again. And I would assume that whatever  
21 safeguards are available before the -- whoever  
22 conducted -- whoever conducts the CIR and then  
23 ultimately the Composite Committee would -- again, we  
24 haven't discussed the substance. We've jumped right  
25 ahead to the remedy. I just want that clear.

1           So they would do it with a full record that  
2           would include all of the information with full  
3           knowledge that you now have of what the Defendants'  
4           position is, which may or may not be one of the bases  
5           for why you find a procedural problem with the CIR  
6           decision in the first place, and you get proper  
7           procedure.

8           MR. GRIECO: And, again, your Honor --

9           THE COURT: And the proper procedure isn't -- if  
10          proper procedure is followed and the same outcome  
11          comes, then you have the arbitrary and capricious  
12          standard or whatever other standard might be available  
13          to you in reviewing it after proper procedure.

14          MR. GRIECO: So, your Honor, I think there are a  
15          number of points here. First, as I said -- and I would  
16          just argue for purposes of the record I absolutely want  
17          to respond to your inquiry because I think it's a  
18          relevant one, but this is not an argument the  
19          Defendants have raised. Maybe it's -- I would argue  
20          that the raise-or-waive rule makes it such that we  
21          shouldn't have to confront it.

22          THE COURT: Then, to be honest with you, then I  
23          should just deny your motion for a preliminary  
24          injunction because neither of you addressed this -- the  
25          issue of tying the remedy to the findings of breach.

1 MR. GRIECO: Well, so, again, I would  
2 respectfully -- I understand why you would respond that  
3 way, but I don't think that's what the law of the  
4 raise-or-waive rule would dictate here.

5 So what you're suggesting is, you're asking me  
6 about a basis to deny the relief that's being  
7 requested. So it's a position the Defendants would  
8 pursue. The Plaintiffs aren't pursuing this position,  
9 the Defendants are or would need to in order to seek  
10 denial.

11 If it hasn't been raised by Defendants and it's,  
12 therefore, waived by them, the Plaintiffs can't suffer  
13 from the failure of someone to raise a position that  
14 would deny the relief they're seeking.

15 That being said, your Honor, I don't want to get  
16 bogged down on that. I said I wanted to raise it for  
17 the record, and I need to for reasons that I think are  
18 obvious; but I want to respond to it substantively.

19 First, as I said, your Honor, I know there is  
20 case law. I can't cite one off the top of my head; but  
21 there is absolutely federal and state case law, both in  
22 the constitutional due process context and the ERISA  
23 context where there can be substantive problems with  
24 the decision made by an insurer and then there can be  
25 questions about the procedure that the insurer

1 implemented.

2 And in that second circumstance, just like in  
3 the constitutional due process cases, it by no means is  
4 mandatory that you simply remand it. To the contrary,  
5 the case law in many circumstances specifically  
6 describes there are circumstances where a remand is not  
7 appropriate and that --

8 THE COURT: And in the ERISA context, that  
9 usually involves issues of conflict; and here on the  
10 record that's before me, there's nothing that would  
11 lead this Court to believe that if it were to require  
12 that procedure be redone appropriately and consistent  
13 with whatever order one came with, there's nothing  
14 before me that would lead me to believe that USMLE,  
15 et al, wouldn't follow the proper procedure.

16 The only time, for instance, that -- you know,  
17 when that occurs is when you -- there's some element of  
18 conflict that makes the proper procedure unacceptable  
19 because of the underlying conflict or whatnot; but here  
20 there's no evidence before me that if that were the  
21 order, that that's how USMLE, et al, would operate.

22 MR. GRIECO: So I want to be -- and I'm well  
23 familiar with the conflict ERISA cases, your Honor, and  
24 I believe -- and I will find for you ERISA cases where  
25 there's not a conflict but there's been a demonstrated

1 procedural deficiency; and then the rule still is that  
2 remand is not mandatory, and there can be circumstances  
3 where relief should be awarded. And I know that's the  
4 case in the constitutional due process cases and --

5 THE COURT: Tell me why it should be the case  
6 here.

7 MR. GRIECO: I was -- that "and" was bringing me  
8 right to that, your Honor. So there are a number of  
9 reasons.

10 First, in this case, the Composite Committee --  
11 forget for a minute their refusal to look at Dr. Hayes'  
12 report or visit the substance of that report. The  
13 Composite Committee was unequivocally shown in the  
14 initial submission in October of 2020 that the CIR had  
15 failed to disclose the findings -- sorry, the USMLE had  
16 failed to disclose the findings of its investigation,  
17 the staff analysis of the e-mail, so that Dr. Bowary  
18 would have a reasonable opportunity to respond.

19 So one of our procedural arguments about what  
20 was defective about the procedure within the agency was  
21 brought to the Composite Committee's attention. They  
22 don't dispute in any way, shape or form that that was  
23 timely brought to their attention.

24 And not only did they not find that there was  
25 that actual procedural deficiency that contradicted

1       their own policy, they just ignored it. They didn't  
2       even reach it. They didn't discuss it.

3               So I think it's contrary to the case law, which  
4       I'm happy to provide your Honor after today, but it's  
5       contrary to, again, fundamental fairness and even logic  
6       to say, Okay, in this instance, Composite Committee,  
7       you were aware that USMLE breached its own policy in  
8       failing to disclose the central piece of information in  
9       evidence, the staff analysis of the e-mail, upon which  
10      you imposed these sanctions.

11             You were aware of it, you knew they didn't  
12      disclose it, and that Composite Committee knowing that  
13      still refused to grant the doctor any relief.

14             So what you're suggesting be done, it be  
15      remanded to them so they can disclose it and let the  
16      process move forward, they already knew had occurred,  
17      that that defect happened, and they still unfairly  
18      refused to remand it to their own CIR Committee. So  
19      what you're suggesting could happen going forward  
20      happened before we even showed up in court.

21             So I don't know why a party who refused to  
22      correct their own procedural remedy, which, by the way,  
23      is a breach of contract, it's not just some procedural  
24      rule, their failure and refusal to remedy their own  
25      breach of policy, of procedure, of contract and of

1 fairness, why they should get yet another bite at the  
2 apple to do it, particularly in the context here where  
3 Dr. Bowary doesn't have the time for this, Judge.

4 He's going to be -- you saw Ms. Taylor's  
5 affidavit. In September, he's going to get asked, Can  
6 we see your unrestricted medical license? And sometime  
7 between September and sometime mid-December, if he  
8 doesn't have it, it's going to be denied. His petition  
9 for change of employer is going to be denied, and he's  
10 going to be deported.

11 So that's an overarching reason why they  
12 shouldn't get yet another bite at the apple; but even  
13 if that timeliness was there, Judge, what you're  
14 suggesting -- not what you're suggesting but what  
15 you're asking about is that a party like this who has  
16 twice refused to comply with their own contractually  
17 required procedure get a third bite at the apple.

18 At some point, and this is what I believe the  
19 cases that I will provide to your Honor say, the  
20 circumstances both in the ERISA context and in the  
21 constitutional due process cases where the Court has  
22 made the determination, and there are First Circuit  
23 cases on this, that remand is not the answer and that  
24 relief to be granted to the Plaintiff is the answer are  
25 circumstances like this where a Defendant can't get

1 one, two, three bites at the apple because there's  
2 prejudice to the Plaintiff based on their failure to  
3 appropriately give fair and reasonable procedures in  
4 the first place.

5 And then lastly here, Judge, I would say again,  
6 and these are the circumstances that -- and because a  
7 request for a preliminary injunction is equitable  
8 relief, we're balancing the equities here, this is a  
9 party who got an expert report that, as I argued  
10 earlier, is simply unrefuted of a person with sterling  
11 credentials and reputation and I would say made a  
12 semantic, if not just blatantly biased, decision to  
13 say, Well, you didn't give it to us by the date we  
14 asked you please to give it to us, so now we're not  
15 even going to look at it; and doing that in the context  
16 of precluding a doctor from even taking this test for  
17 three years in and of itself is outrageous.

18 Three years not being able to practice medicine  
19 would be dramatically negative to any physician's  
20 career, never mind one who's about to be deported.

21 And they, "they" being the Defendants,  
22 absolutely knew that this was a foreign-born doctor  
23 here on a visa because they know from his ECFMG profile  
24 that's exactly what he is.

25 So, again, they made the initial determination



1 not to disclose the very information they were going to  
2 sanction him on. When they were told -- when the  
3 Composite Committee was told that they made this  
4 egregious error, they refused to remedy it then knowing  
5 that their three-year ban was probably going to either,  
6 at a minimum, dramatically negatively impact this  
7 doctor's career and in reality there was a high  
8 likelihood he was going to be deported as we now have  
9 found out.

10 And then, lastly, they got the very evidence  
11 they could have gotten had either the CIR and the USMLE  
12 first disclosed their analysis of the e-mails or their  
13 Composite Committee recognizing that it hadn't been  
14 done before, had remanded it to the CIR. That very  
15 evidence they would have gotten. Dr. Hayes' report  
16 they had, and they used this semantical "we're not  
17 looking at it."

18 And not only was there no deadline. They sent  
19 an e-mail saying, Please send us stuff by January 1.  
20 When we submitted after January 1, because of the  
21 extent of the analysis that had to be done, I, on the  
22 phone and in writing, said to the USMLE secretariat,  
23 the office at USMLE that handles these proceedings,  
24 that if the Composite Committee needed more time to  
25 review that report, we had no objection to them

1 deciding it at their next meeting.

2 So, in essence, I said, If you feel like you  
3 can't review this now, then continue the matter and  
4 review it a month from now, two months from now. They  
5 said no to all of that; and, therefore, the equities do  
6 not weigh in favor of giving them another bite at the  
7 apple and sending it back yet again for them to figure  
8 out yet another sort of bias way to play "gotcha" and  
9 test this doctor, number one.

10 Number two, lastly, Judge, this three-year ban  
11 is Draconian because it's not just a ban you can't take  
12 our test. The USMLE's perception, if not their  
13 argument, is, well, it's our test and we get to impose  
14 sanctions if we think somebody did something wrong.

15 That's not all that happens here. When you  
16 can't take the test, as we've demonstrated  
17 unequivocally, it is devastating to a physician's  
18 career at a minimum; and in this case, it's going to  
19 lead to deportation. So in that setting the equities  
20 again balance in favor of him just taking the test  
21 again.

22 The USMLE, a nongovernmental agency, unlike the  
23 medical licensing board here in Rhode Island, should  
24 not be in a position to literally preclude a doctor  
25 from ever practicing medicine.

1           Instead, it is the licensing bodies who are the  
2       lawful authorities who decide if people should practice  
3       medicine. They are the entities who should decide if a  
4       physician's conduct warrants them not practicing.

5           And in this case, while the Rhode Island medical  
6       board has absolutely taken a position, hence the  
7       voluntary agreement, that without an official passing  
8       USMLE score you can't have a license, they have not  
9       sought to take his license away based upon any of these  
10      allegations of fraud.

11          And should they wish to do that, they're well  
12      within their rights to do it. They still have the  
13      ability to do it should they change their mind down the  
14      road.

15          And I would argue that if anyone is going to  
16      look at this alleged conduct that has now been, again,  
17      on this record irrefutably shown not to be true, that  
18      the e-mail had been irrefutably on this record shown to  
19      be authentic, that if anyone was going to get into  
20      these allegations that Dr. Bowary concocted that  
21      e-mail, it should be the medical board that has a  
22      statutory and constitutionally required process that is  
23      fair to parties, fair to doctors, gives them not only  
24      discovery in a case, gives them the opportunity to get  
25      the information that's going to be used against them to

1 support any of these allegations, but gives a full and  
2 fair hearing process before a third-party hearing  
3 officer, not the entity like here with USMLE where it's  
4 all the same entity that is judge, jury and prosecutor.

5 And so the three-year ban, in and of itself, I  
6 would argue, especially on this record, is something  
7 that is just the equities weigh in favor of taking away  
8 that three-year ban and letting him take the test  
9 because if anyone is going to decide this physician  
10 should not practice because of these allegations, it  
11 should be the medical board that has a lawful and  
12 statutory process to make that position.

13 THE COURT: Let me hear from Mr. Burgoyne now  
14 and focus you, Mr. Burgoyne, on the part that we've  
15 kind of been assuming, which is that procedural breach,  
16 and talk to you first about that, and then we'll get  
17 into the remedy piece.

18 So tell me why you don't believe the Court  
19 should make a finding that both in the failing to  
20 disclose the staff analysis to the Plaintiff in a  
21 timely fashion they haven't violated their own internal  
22 policies and procedures.

23 MR. BURGOYNE: Sure, Judge. There are really  
24 two documents relevant here, Judge. First is the  
25 bulletin of information. Second is the policy and

1 procedure document relating to irregular behavior.

2 Both essentially say the same thing: We will  
3 alert you to the grounds for the investigation, and we  
4 will tell you the relevant findings that result from  
5 that investigation and give you the opportunity to  
6 respond.

7 It's clear that in the April 2020 e-mail or  
8 letter that was sent to Dr. Bowary, he was given nine  
9 bullet points that set forth the relevant findings.  
10 Within those nine bullet points included two key  
11 factors: One, we've got no record of NBME ever sending  
12 you an e-mail as you allege and, two, the score report  
13 attached to that e-mail is inauthentic in numerous  
14 ways.

15 So he's put on notice immediately that he has  
16 potentially committed an act of irregular behavior by  
17 submitting to the Rhode Island Health Department an  
18 inauthentic score report.

19 THE COURT: But you must admit that a crucial  
20 piece of information was missing from that April 20th  
21 that was then contained in the September 2020 letter  
22 and that being the three bulleted paragraphs that  
23 reference the staff analysis.

24 MR. BURGoyNE: Yes.

25 THE COURT: And you, as the fine lawyer that you

1 are, have to acknowledge that knowledge of that  
2 information by the Plaintiff here could be game  
3 changing for their ability to defend themselves in a  
4 timely and appropriate fashion.

5 MR. BURGOYNE: At least two points in response  
6 to that, your Honor. One, if you look within the  
7 documents, you will see that the USMLE CIR was given a  
8 summary report of the findings that were made against  
9 Dr. Bowary. They included the identical nine findings  
10 that were given to Dr. Bowary in the April letter. So  
11 they were given the same broad relevant findings as  
12 him.

13 True, he was not provided in advance of the CIR  
14 with the findings made by the staff, but I don't know  
15 that you can necessarily acknowledge Plaintiff's  
16 position that those were critical findings to the CIR's  
17 decision.

18 THE COURT: How could it not be?

19 MR. BURGOYNE: Well, because, your Honor, even  
20 if the e-mail was authentic -- and we don't agree that  
21 it is unchallenged that that is an authentic e-mail.  
22 Obviously, that's premature. It was never an issue in  
23 the PI context. That's why we haven't come in with an  
24 expert, et cetera, on that issue; but there was all  
25 sorts of additional evidence showing that the score

1 report attached to that e-mail is inauthentic; and at  
2 the end of the day, that's the key irregularity here.  
3 He has asked a state agency to rely upon an inauthentic  
4 score report.

5 So we can get sidetracked on the authenticity of  
6 this e-mail and script and all that stuff, but at the  
7 end of the day we are confronted with a score report  
8 that is inaccurate.

9 And that was one piece of the -- the internal  
10 analyses done by staff was some of the information  
11 considered by the CIR but not all of the information.

12 So let me direct your attention, your Honor, to  
13 an important piece of information that was included  
14 within the nine bullet points but that -- and was  
15 called to Dr. Bowary's attention.

16 If you look at -- Dr. Bowary, after he failed  
17 this Step 3 exam a second time, he registered to take  
18 the exam a third time; and when he did so, he got an  
19 eligibility period that extended from February 2020, I  
20 think, to -- actually February 2019 through December  
21 2019 or July 31, 2019.

22 He ended up not testing. Instead, at the end of  
23 his registration period on July 31st, which is a few  
24 weeks after he purportedly received this e-mail, he  
25 contacts the FSMB and says, I'd like to get a refund of

1 my registration fee for the exam, my third taking of  
2 the exam.

3 And the reasons he gives are extenuating  
4 personal circumstances, including the fact that he's  
5 been distracted trying to deal with his visa status.

6 There's no mention in his July 31st e-mail to  
7 the FSMB of his having received an e-mail message from  
8 NBME telling him he has a new passing score.

9 And then he sends a follow-up e-mail on  
10 August 9th. Again he makes no mention of having  
11 received a few weeks earlier a score report from NBME  
12 showing that he's passed the exam.

13 THE COURT: But, Mr. Burgoyne, that's not  
14 contained in the April 2020 letter.

15 MR. BURGOYNE: Well, that information is in the  
16 April letter to him.

17 THE COURT: Where?

18 MR. BURGOYNE: It's a discussion -- --

19 THE COURT: Looking at ECF 9-1 at pages 8, 9 and  
20 10.

21 MR. BURGOYNE: If you look, your Honor, it is  
22 the second bullet point in the April letter, and that  
23 discusses the fact that when he asked for a refund in  
24 July -- actually, what it points to is that in his  
25 March forwarding -- two things happened, your Honor.



1 He's given two different explanations for why he asked  
2 for a refund.

3 When he sent the purported revised score report  
4 and the purported e-mail from NBME to the FSMB and to  
5 the Rhode Island Department of Health, he told them he  
6 had been given a refund by the Federation of State  
7 Medical Boards because he had gotten an updated score  
8 report reflecting a passing score.

9 However, when he actually got that refund back  
10 in July and August and he contacted the FSMB, he said,  
11 Please give me a refund. I need that because of  
12 extenuating personal circumstances relating to my visa.

13 THE COURT: I don't see any of that -- I  
14 understand that they make mention of the refund in the  
15 second bullet point; but it says, You noted that the  
16 refund was for the subsequent Step 3 application that  
17 was voided because of the change from a fail to a pass  
18 on your April 8th, 2018, Step 3 administration.

19 MR. BURGOYNE: That's right, and that is  
20 directly contradicted by the e-mails he had sent to the  
21 FSMB.

22 THE COURT: Right, but none of that's in the  
23 April letter, that second part.

24 MR. BURGOYNE: They were just summarizing the  
25 factors that they had considered.

1 THE COURT: I'm having a real hard time,  
2 Mr. Burgoyne, finding, to be honest with you, that -- I  
3 mean, I'm kind of jumping further along, but I did it  
4 to Mr. Grieco so I'll do it with you.

5 I'm having a really hard time finding that the  
6 USMLE followed its own policies and procedures in --  
7 beginning with the CIR April 20th letter.

8 I think under any scenario that the failure to  
9 inform the doctor of the existence of the staff  
10 analysis concerning the validity of the e-mail and/or  
11 the score report is a violation of your policies and  
12 procedures.

13 MR. BURGOYNE: Your Honor, let's accept that  
14 proposition. Okay? I'm not conceding it, but let's  
15 accept the proposition for present purposes.

16 So the CIR secretariat should have alerted  
17 Dr. Bowary in advance of the CIR hearing and given him  
18 copies of the internal staff analysis. They didn't.  
19 Okay.

20 Under their policies, one of the two grounds for  
21 appealing to the Composite Committee is the CIR failed  
22 to follow its procedures; and that's obviously the  
23 argument they're making here, they should have followed  
24 their procedures by giving us all the IT analysis that  
25 was done internally. So Dr. Bowary and his new lawyer

1       obtained those documents.

2               THE COURT:   When did they obtain those,  
3       Mr. Burgoyne?

4               MR. BURGOYNE:   They obtained them in November,  
5       your Honor, although the existence of those documents  
6       was disclosed in September as part of the September  
7       letter.   They were provided to Dr. Bowary's counsel at  
8       his request as part of e-mails that went in after he  
9       confirmed his representation.

10              MR. GRIECO:   Actually, your Honor, they were  
11       produced after we submitted our appeal.   We submitted  
12       our appeal in October, and we got them after the appeal  
13       was even submitted.

14              THE COURT:   Yeah, I think Mr. Burgoyne said that  
15       you got them -- they're clearly referenced in the  
16       September 27th letter, and he said that you got them  
17       sometime in November.

18              MR. BURGOYNE:   Yes.   So, your Honor, they got  
19       them well in advance.   Now -- you know, and they got  
20       them well in advance of a January 1, 2021, deadline by  
21       which they were asked to submit any additional papers  
22       they wanted to submit.

23              As early as October 22nd, Dr. Bowary's counsel  
24       said he had already obtained important substantive  
25       information that he would provide shortly.   He didn't

1 provide it shortly. He didn't provide any additional  
2 information, including this so-called critical report  
3 by Professor Hayes, until the eve of the hearing before  
4 the Composite Committee.

5 He had literally months to provide additional  
6 evidence based on this internal IT report showing that  
7 the e-mail was legitimate.

8 THE COURT: Well, Mr. Burgoyne, let me take you  
9 back for a second from the Plaintiff's perspective, and  
10 then tell me where this is wrong. I understand your  
11 argument. Actually, when we round-tabled this in my  
12 chambers, we went through that very argument. So I'm  
13 not surprised that you would come up with it. It makes  
14 sense.

15 If USMLE had followed its procedures and in  
16 April had turned over the documents or at least  
17 referenced them so they could have been asked for, if  
18 they had known of that existence, Dr. Bowary would have  
19 had eight, nine months to prepare a defense before the,  
20 and I'm going to put in quotes, "deadline," because I  
21 know the Plaintiff challenges that term, but the  
22 January 1st submission date; and instead, not getting  
23 the documents until November, they only had two months.

24 So is it really fair for USMLE to rely on the  
25 fact that it took them an additional month and a week

1 to be able to produce their report than what the  
2 deadline, again, in air quotes, was when, in fact, the  
3 Court is likely to find that it should have been turned  
4 over to them in April?

5 MR. BURGOYNE: Two things, your Honor. First,  
6 in terms of the timing, Dr. Bowary's new lawyer  
7 contacts NBME or the USMLE on October 21st, and the  
8 USMLE immediately confirms his representation.

9 He then asks for various documents to be  
10 produced, including the internal IT analyses, and those  
11 were produced on November 10th. So it's not a month  
12 plus. It's a matter of a couple of weeks. Fairly  
13 promptly they turn over the reports.

14 The expert report is then not tendered to the  
15 USMLE office of secretariat until February 9th. So  
16 we're really looking at a period there of two-plus  
17 months before the report is prepared. Had they  
18 disclosed --

19 THE COURT: Hold on, Mr. Burgoyne. But eight  
20 months before a possible finding that it should have  
21 been turned over.

22 MR. BURGOYNE: Well, it's really -- the  
23 intervening step in there wasn't the January 1 deadline  
24 because there was the CIR hearing. So the proposition  
25 really is that it should have been turned over in

1 advance of the CIR hearing, which I believe -- I'm just  
2 trying to find that date, your Honor. That was in  
3 August 2020.

4 THE COURT: Right.

5 MR. GRIECO: Your Honor, I just would point out  
6 the irony --

7 THE COURT: Hold on, Mr. Grieco. We'll get back  
8 to you. This is Mr. Burgoyne's turn.

9 MR. GRIECO: I thought he had finished. I  
10 apologize.

11 MR. BURGOYNE: No, I haven't finished, your  
12 Honor. You've asked a lot of questions, and I'm happy  
13 to respond to all of them.

14 THE COURT: Sure. Appreciate it. Go ahead.

15 MR. BURGOYNE: Your Honor, I don't think -- I  
16 mean, could you make the case that it was unfair or  
17 unreasonable for the Composite Committee not to  
18 consider a document that was provided to it the  
19 afternoon before it was scheduled to decide  
20 Dr. Bowary's case and seven others?

21 You could, but you as well as anyone knows, your  
22 Honor, judges know like everyone else knows, there are  
23 deadlines; and we don't think it's fair to dismiss that  
24 as a polite request simply because we said, Please  
25 submit your material by January 1st, 2021.

1           There was an opportunity here. This is -- no  
2 explanation has been given at any point as to why  
3 information that purportedly was in hand as soon as  
4 October wasn't provided to the Composite Committee  
5 until February.

6           Even in the voluntary agreement not to practice  
7 medicine, there's a statement that Dr. Bowary intends  
8 to prove that the e-mail and the score report were  
9 authentic.

10          So as early as October they've made that  
11 commitment and made the statement that they've got  
12 evidence already that it's authentic, yet nothing was  
13 offered prior to February 9th, nor was any request  
14 made.

15          Dr. Bowary's counsel said how unfair it was that  
16 they wouldn't consider this information, but at no  
17 point was the secretariat or was the Composite  
18 Committee asked to grant an extension or to extend the  
19 hearing date until the eve of the hearing.

20          And, you know, that's no different than, you  
21 know, coming in at the last minute on an appellate  
22 argument and filing a supplemental brief and the Court  
23 saying, We're not going to consider that, you know,  
24 we've got the argument tomorrow, nor are we going to  
25 postpone an argument that people have been working on

1 the last -- on a case people have been working the last  
2 two weeks.

3 THE COURT: I can't imagine if this were a  
4 criminal case and a Defendant came forward with  
5 exculpatory information the night before a hearing a  
6 Court wouldn't grant a continuance to allow it to come  
7 in and be considered, and that's really what the  
8 information -- I mean, look, this comes down to, right,  
9 whether Dr. Bowary or someone on his behalf  
10 fraudulently put together an e-mail and a score report.

11 You and your client believe the evidence is  
12 clear that he did; and, therefore, I'm bothered by  
13 maybe some of the procedural niceties, so to speak. I  
14 get that. I totally understand that.

15 On the other hand, you have Dr. Bowary who  
16 admits no piece of this and admits that he took certain  
17 actions in compliance with what he believed and he  
18 continues to believe was an actual communication from  
19 the medical licensing board and they -- and, therefore,  
20 the procedural parts of this have sharper edges when  
21 you believe that. Right?

22 And as I told you at the beginning of all this,  
23 I have no opinion one way or the other whether -- how  
24 that e-mail and score report came about, whether it was  
25 through fraud or whether it was real; and, therefore,



1 as I said, because I am not convinced either way, it's  
2 likely in my mind that the Plaintiff will fail on the  
3 record that's before us on that issue.

4 But it does go back to whether the procedures  
5 were properly followed; and, you know, I don't live in  
6 your world that you clearly live in being attorneys for  
7 these folks in terms of, you know, what's acceptable or  
8 not within the context of USMLE. I have to look at the  
9 law.

10 The law's governed by the policies and  
11 procedures and the common law of good faith and fair  
12 dealing and whatnot; and it does seem to me that there  
13 are procedural problems here with the Defendants'  
14 initial actions back in April and that under any  
15 scenario, whether it was some of his fault or not his  
16 fault in asking more quickly, substantively inured to  
17 the detriment of the Plaintiff here.

18 And so with all of that said, let me tell you  
19 what I'm going to --

20 MR. BURGOYNE: Your Honor, can I address two  
21 points quickly?

22 THE COURT: Absolutely. Sure.

23 MR. BURGOYNE: And I apologize. One is I think  
24 it's important to understand one fact which is not  
25 disputed. Dr. Bowary failed the April 2018 exam. He

1 acknowledges that in his reply brief, and he said there  
2 were extenuating circumstances. Likewise, it's  
3 undisputed he failed the December 2018 exam.

4 So at this point there's clearly no basis to  
5 order NBME to report to the Rhode Island Department of  
6 Health that he has a passing score.

7 THE COURT: I agree with you.

8 MR. BURGOYNE: So that's a nonissue. So we're  
9 really left with should you order them to allow him to  
10 test immediately.

11 THE COURT: Well, no, I think there's a third  
12 alternative, which is afford --

13 MR. BURGOYNE: Well, no, exactly, your Honor, on  
14 the merits I agree. I'm just focusing on the relief as  
15 they frame it.

16 THE COURT: I think when you hear where I'm  
17 going with this, you'll --

18 MR. BURGOYNE: Okay.

19 THE COURT: You'll understand.

20 MR. BURGOYNE: If you're going in that  
21 direction, I don't need to beat a dead horse. I will  
22 point out there was discussion of remedy. One of the  
23 cases Plaintiff relies upon is the *Dalton* case and  
24 Educational Testing Service, and that was a case where  
25 the Plaintiff argued ETS promised it would consider the

1 submissions by the test taker and it failed to do so.

2 And at the end of that exercise, the appellate  
3 court in New York said the appropriate remedy in this  
4 case is for us to send it back to ETS in the first  
5 instance, do what it told the examinee it would do.

6 And so we would certainly agree with your Honor  
7 that the remedy ultimately in this case, if you were to  
8 agree with the Plaintiff on the merits, would be a  
9 remand for the internal processes to take place in the  
10 manner that your Honor concluded if it did come to that  
11 that should have been done.

12 MR. GRIECO: Your Honor, may I be heard on that  
13 point?

14 THE COURT: No. I'm really ready to tell you  
15 where we're going, and that's precisely where we're  
16 going to go, Mr. Burgoyne, where you ended.

17 I have reviewed extensive and well-done briefing  
18 and heard fine arguments and reviewed all of the  
19 evidence in the case; and it is clear to me that an  
20 injunction, preliminary injunction, should issue.

21 The preliminary injunction is -- and I'm going  
22 to ask the Plaintiff to draft a copy in consultation  
23 with the Defendants on this, what it should say, but  
24 will -- I don't think -- "remand" isn't the right legal  
25 word but that an injunction will issue that the USMLE

1 and its affiliates should -- are required to provide  
2 Dr. Bowary with the procedure set forth in its policies  
3 and procedures document that begin with the Committee  
4 for Individualized Review and for them to review the --  
5 all of the material that the Plaintiff wishes to submit  
6 in support of his position and that the remainder of  
7 the policies and any appeal that comes from it should  
8 then -- and rights thereunder should follow. Period.

9 Any and all other -- and the Court finds that  
10 because there's a likelihood of success in the Court's  
11 opinion that the Defendant breached the contract as to  
12 the policies and procedures that was afforded to  
13 Dr. Bowary, that irreparable harm will come to him  
14 without affording him the proper procedure by way of  
15 his continued lack of license and his potential  
16 deportation and that the equities balance in favor of  
17 giving him proper procedure.

18 Short of that, the request for a preliminary  
19 injunction is denied. The Court does not believe that  
20 it can nor should order either a retaking of the test  
21 outside of the context of what the Defendants have  
22 already ordered, that is, after three years, or his --  
23 you know, any order to require the Board of Medical  
24 Licensure in Rhode Island to accept the fact that he  
25 has a passing score. There is no likelihood of success

1 on any of the merits of those claims that would inure  
2 to that remedy.

3 In addition, in consultation, Mr. Grieco, with  
4 Ms. Taylor, you can craft whatever you might believe is  
5 acceptable language that the Court is empowered  
6 concerning any potential deportation while this matter  
7 is under process before the Defendants.

8 MR. GRIECO: So let me ask you about that, your  
9 Honor, so we can do it consistent with what you're  
10 suggesting. Are you suggesting that we draft an order  
11 that you enter that will prevent him from being  
12 deported until -- what are you suggesting?

13 THE COURT: I don't know the answer to that.  
14 They are not before me, so I can't order that at all.  
15 I said that to you all informally before, that I have  
16 no powers against immigration because they're not  
17 before me.

18 However, if there's language consistent with  
19 what the Court's intent is that Ms. Taylor and you can  
20 find acceptable that's within the powers that the Court  
21 can do considering who's before it right now, then I  
22 would find that acceptable in the order.

23 MR. GRIECO: And the intent you're referring to  
24 is, understanding this would not be an order on a party  
25 that's not presently before you, but the intent that

1       you want us to reflect is that you don't --

2               THE COURT: Is that while the Court is  
3 continuing its proceedings in this matter, that it is  
4 the Court's order that Mr. Bowary remain in this  
5 country, able to work and assist in his presentation  
6 before the Defendants and before the Rhode Island  
7 Medical Licensing Board.

8               Again, I'm not an immigration lawyer, and I'm  
9 not -- have not thought that through completely, that  
10 part. That's why I'm going to put it on you to draft  
11 what's appropriate.

12              Just know that it can't be that I order him not  
13 deported because they're not before me, but I think  
14 Ms. Taylor can come up with language that will assist  
15 her in stopping anything being done because Dr. Bowary  
16 should be allowed to stay in this country while his  
17 rights are being adjudicated in the medical licensure  
18 piece.

19              MS. TAYLOR: If I may, thank you, your Honor.  
20 This, of course, is not ripe at this time. We don't  
21 anticipate really a final decision in his visa  
22 application until perhaps December, but we appreciate  
23 your thinking in this regard.

24              THE COURT: Okay. Thanks. And work with  
25 Mr. Grieco on language that you might find helpful down

1 the line.

2 MS. TAYLOR: Thank you.

3 THE COURT: And then, Mr. Burgoyne, you know, I  
4 don't understand the procedures. I don't even  
5 understand the terminology that you all use. I was  
6 telling my clerks earlier that the language is so odd  
7 to me of Composite Committee and the CIR Committee and  
8 whatnot.

9 I don't know who's composed of it. I don't know  
10 how they're composed of it. I don't know anything  
11 other than the facts that are before me on the policies  
12 and procedures that were submitted; but as I said to  
13 Mr. Grieco, I'm going on the assumption that these  
14 folks, the Defendants and these committees, will act in  
15 good faith in terms of a proper evaluation and a proper  
16 decision-making process that's consistent with what  
17 your policies and procedures are because there's  
18 nothing before me that would tell me otherwise that  
19 they would do that.

20 MR. BURGOYNE: Your Honor, I certainly agree  
21 there's nothing to suggest they haven't done so in the  
22 past and nothing suggesting that they won't do so going  
23 forward.

24 It was -- you know, we have a policy in place  
25 that specifically contemplates arguing that the CIR

1        didn't comply with its procedures.

2                So it gets down to a question of, you know,  
3        getting information in a timely manner to the Composite  
4        Committee so that it can make an informed decision,  
5        which didn't happen. Obviously, we'll respect your  
6        Honor's decision in that regard going forward on  
7        remand.

8                Your Honor, what happens to the case in the  
9        interim?

10              THE COURT: Well, I think it probably makes most  
11        sense, unless you tell me otherwise -- I mean, I'm kind  
12        of open, but I thought through that, Mr. Burgoyne, is  
13        once you all agree on what that order looks like  
14        granting that limited injunction, it's only a  
15        preliminary injunction, so we should keep the case open  
16        which will allow -- I don't know. I guess it would  
17        just allow -- we could dismiss the case and then allow  
18        it to be refiled.

19              Now that I'm thinking out loud on that, it's a  
20        really good point, Mr. Burgoyne. I don't see any  
21        reason, then, not to turn it into a permanent  
22        injunction; and then if you want to appeal it, that  
23        will give you the right to appeal it.

24              MR. BURGOYNE: Well, I'm just mostly trying to  
25        think about how to handle this in a cost-effective and



1 efficient manner for everybody.

2 THE COURT: Yeah.

3 MR. BURGOYNE: And we don't object to the case  
4 being just placed in a dormant status while all that is  
5 going on on the side.

6 It does seem to me that converting it to a  
7 permanent injunction on the heels of a process that  
8 didn't envision that beforehand seems problematic. We  
9 didn't get to put forward all of our evidence that we  
10 would have had we contemplated that.

11 THE COURT: Sure. I think it makes sense.  
12 We'll do similar to what we do -- we often get cases  
13 where people ask us to confirm an arbitration award or  
14 to order arbitration in proceedings; and assuming we do  
15 that, which the law being what the law is, you often do  
16 that, send it back for arbitration, we just hold the  
17 case there until we're informed after the end of the  
18 arbitration procedure, here at the end of whatever  
19 procedures take place between the Plaintiff and the  
20 Defendants, and then just wait for the parties to  
21 notify us whether further action is needed.

22 MR. GRIECO: Your Honor, can I be heard on  
23 what's going to happen in terms of both the case and  
24 the specifics of this injunction that's entered?

25 So in terms of holding what's going to happen

1 with the case, I would strenuously object to obviously  
2 dismissal but certainly just holding it in abeyance.

3 There's a variety of reasons. Number one, the  
4 doctor has other claims, including defamation claims,  
5 libel claims, which regardless of your Court's ruling  
6 here are claims that are viable, have reason to go  
7 forward, and there's no reason why they should be  
8 stayed in the meantime, number one.

9 THE COURT: There's a lot of reasons it could be  
10 stayed. I think for judicial economy and for the  
11 economies of the parties, until the procedural aspect  
12 of this is resolved in a fashion that's appropriate,  
13 that it would waste parties' and judicial time to do  
14 anything other than stay the remaining until this  
15 procedure --

16 MR. GRIECO: Here's why I would respectfully  
17 again disagree, your Honor. So let's assume that this  
18 process goes forward and Dr. Bowary's appropriately and  
19 finally fairly heard by USMLE committees and they  
20 decide that he shouldn't be subject to a three-year ban  
21 and they let him take the test.

22 That doesn't change the fact that their actions  
23 before which we contend violated their own policies and  
24 procedures and, therefore, breached their contract with  
25 him have caused him damage at a minimum through libel

1       regardless of what the outcome of these remanded  
2       proceedings are; and so those claims are viable no  
3       matter what happens in these remanded proceedings.

4               On the other side of the coin, and this is what  
5       I find -- and I think you know me well enough, your  
6       Honor. I'm not in any way trying to be disrespectful  
7       to the Court.

8               THE COURT: You never have been. You don't have  
9       to worry about that at all.

10              MR. GRIECO: All right. I'm worried about what  
11       I'm going to say because remanding creates a quagmire  
12       at a minimum, if not a difficult context in which the  
13       Defendants could do anything fairly, and I say that for  
14       this reason.

15              THE COURT: They could do what?

16              MR. GRIECO: Do anything fairly, and I say that  
17       for this reason, Judge. If they now decide on remand  
18       that USMLE and the CIR breached the policies and,  
19       therefore, he should be able to submit new and  
20       additional evidence, then that actually helps to  
21       bolster in evidence all of the claims in this case that  
22       we will be going forward on no matter what happens.

23              THE COURT: They're not going to make that  
24       determination at all. I've made that determination.  
25       I have ruled and will be in the injunction that the

1 April 27th, 2020, letter was deficient in that it left  
2 material matters out of the notice to Dr. Bowary; and,  
3 therefore, Dr. Bowary is entitled to a redo.

4 And that means that the Plaintiff can submit to  
5 the CIR and then ultimately, if need be, to the  
6 Composite Committee whatever it wants in an appropriate  
7 timing of those events consistent with their rules and  
8 get a full and fair hearing.

9 MR. GRIECO: Okay. So that's the point I was  
10 going to make, your Honor, which is similar to this but  
11 even more dramatic. There is literally a  
12 disinclination upon this remand for the Defendants to  
13 find in favor of Dr. Bowary because if they do, all  
14 these claims he has pending are bolstered. The damages  
15 are extended.

16 I mean, it would be -- quite frankly, if I were  
17 advising them, I'd say I don't know how you find that  
18 Dr. Bowary was not guilty of this stuff because if you  
19 do, you're basically admitting you shouldn't have done  
20 all these things in the first place, that you damaged  
21 him by doing so.

22 I mean, I don't know how -- maybe I shouldn't  
23 say this out loud, but I don't know how the Defendants  
24 in a further hearing process decide in Dr. Bowary's  
25 favor because they will enhance the damages against

1       them.

2               THE COURT: You already said it out loud, and I  
3 think that inures against your client's best interest,  
4 to be honest with you, Mr. Grieco.

5               MR. GRIECO: I don't think it's saying anything  
6 that their attorney wouldn't figure out, Judge. If I  
7 figured it out in 30 seconds, I'm sure they're going to  
8 figure it out before we have a hearing.

9               THE COURT: I have said before and I'll say it  
10 again, there is nothing before the Court that leads me  
11 to believe that USMLE, its attorneys and its agents  
12 will do anything that violates their policies and  
13 procedures and will do anything other than give a fair  
14 hearing.

15              MR. GRIECO: Despite the fact that you found  
16 they already have.

17              THE COURT: No, I found that -- to be honest  
18 with you, I found that they probably made a clerical  
19 error in not listing material in their April letter  
20 that they should have listed. That's what they did  
21 wrong.

22              And that does not lead me to believe that USMLE  
23 has it out for Dr. Bowary at any point or had it at any  
24 point. You know, I don't know why you're making me say  
25 this, but I will. I think USMLE, except for that one

1        what I'll call clerical glitch that occurred in not  
2        putting that material forward, I think acted consistent  
3        with good faith, and I expect them to continue to do  
4        that.

5                And I just want them to do that with full  
6        information, with full knowledge so that you can put on  
7        a full defense before them.

8                MR. GRIECO: Fair enough, Judge. I'm just  
9        reacting to comments you made like when they talked  
10       about the January deadline here in this hearing, you  
11       said I would expect a Court who got exculpatory  
12       evidence the night before a hearing would hear that  
13       evidence. They didn't do that here.

14               So that's another indication of them making a  
15       pretty dramatic decision contrary to what I would  
16       suggest is fairness, but I respect your Honor's  
17       decision.

18               The last thing I will ask is, can we have a  
19       timeframe within which this hearing must occur because  
20       as Ms. Taylor told you --

21               THE COURT: Why don't you work with Mr. Burgoyne  
22       and work that into the order.

23               MR. GRIECO: Sure.

24               MR. BURGOYNE: We'll do that, your Honor.  
25       Obviously, there are regular hearings held by the -- I

1       assume the first step is to have a new hearing before  
2       the CIR. I will determine when that could occur. And  
3       then the Composite Committee, if there's a desire on  
4       Dr. Bowary's part to -- if there's an adverse decision  
5       and he were to appeal, I'll find out when that next  
6       hearing would likely be scheduled.

7               THE COURT: Why don't you work together on that;  
8       and if there's any problem, you can come back to me.

9               MR. GRIECO: Very well. Thank you, your Honor.

10              THE COURT: Ms. Taylor?

11              MS. TAYLOR: Thank you for hearing me, your  
12       Honor. I wonder that in a case with as many issues  
13       floating as this one has, would it be useful to  
14       schedule a status conference perhaps in four months'  
15       time so we can all come back and say what has been  
16       accomplished and what is out there? And certainly  
17       we'll know more about the immigration case.

18              THE COURT: That would be great. Why don't we  
19       do that for the end of January. Oh, wait a minute.  
20       Four months --

21              MS. TAYLOR: December.

22              THE COURT: Let's do that in December.

23              MS. TAYLOR: December would be great. That  
24       would be excellent.

25              MR. GRIECO: Thank you, Judge.

1 THE COURT: Thanks, Ms. Taylor. Thanks,  
2 Mr. Grieco. Anything else, folks? And write something  
3 up, Mr. Grieco, in consultation with Ms. Taylor, get it  
4 to Mr. Burgoyne and Mr. Duffy, come to some agreement;  
5 and if you can't come to agreement, you both know what  
6 my ruling is. You should be able to; but if for some  
7 reason you can't, then submit different orders and I'll  
8 sign one of them.

9 MR. BURGOYNE: Your Honor, are you envisioning  
10 simply an order, not a decision, at this point?

11 THE COURT: I think just an order effectuating  
12 that.

13 MR. BURGOYNE: That's fine, your Honor. Just  
14 wanted to be clear. Okay.

15 MR. GRIECO: Thank you very much.

16 MR. BURGOYNE: Thank you, your Honor.

17 THE COURT: Good luck to everybody. Thank you.

18 (Adjourned)  
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## C E R T I F I C A T I O N

I, Karen M. Wischnowsky, RPR-RMR-CRR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

September 15, 2021

Date

/s/ Karen M. Wischnowsky

Karen M. Wischnowsky, RPR-RMR-CRR  
Federal Official Court Reporter